



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of Virginia Strong
for a Permit to Remove Materials From a Pond
Connected to Risk Creek and a Permit to Install
Culverts at the Inlet and Outlet Ends of the
Connected Enlargement, Town of Easton, Adams
County, Wisconsin

Case Nos. 3-WC-01-01048CW
3-WC-01-01049CW

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 5, 2001, Virginia Strong, 613 South Lincoln Avenue, Park Ridge, Illinois, 60068, filed an application with the Department of Natural Resources (the Department) pursuant to Wis. Stat. §§ 30.12 and 30.20, for a permit to remove materials from the bed of a connected enlargement of Risk Creek and to install culverts at the inlet and outlet ends of the connected enlargement. The proposed project is located in the NW ¼, NE ¼, Section 15, Township 16 North, Range 6 East, Town of Easton, Adams County, Wisconsin.

On June 20, 2002, the Department issued Findings of Fact and Order denying the permit. By letter dated July 18, 2002, Virginia Strong filed a request for contested case hearing to appeal the Department's denial of the permit. By letter dated July 22, 2002, the Department granted the request for a contested case hearing pursuant to Wis. Stat. § 227.42. On January 14, 2003, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice including publication hearing was held on June 3, 2003 at Friendship, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ) presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

Virginia S. Strong
613 South Lincoln Avenue
Park Ridge, IL 60068

Roger L. Stiles
3521 Golfview Drive
Hazel Crest, IL 60429

FINDINGS OF FACT

1. Virginia Strong, 613 South Lincoln Avenue, Park Ridge, Illinois, 60068, completed filing an application with the Department of Natural Resources (DNR or Department) for a permit under Wis. Stat. § 30.12, to install culverts on the bed of a pond enlargement connected to Risk Creek, Town of Easton, Adams County. The Department and the applicants have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.

2. The applicant and her brother, Roger Stiles, own real property located in the NW $\frac{1}{4}$, NE $\frac{1}{4}$, in Section 15, Township 16 North, Range 6 East, Adams County. The above-described property abuts Risk Creek, which is navigable in fact just below the project site. The pond enlargement itself is navigable in its present configuration. At the time of the original construction of the pond, the site was determined to be non-navigable. Risk Creek is a navigable stream below the project site and the impacts to the fishery in the navigable portion of the stream, as well as the navigability of the pond itself, give the Department jurisdiction over both the culvert and dredging applications. (Ex. 15, p. 2)

3. The applicants propose to install culverts at the inlet and outlet of a wildlife pond which is connected to Risk Creek. The applicants also want to dredge the pond to a depth of 8 to 10 feet. The culverts would be 1.5 foot in diameter and would have the effect of retaining water and making the pond deeper. Dredging would be undertaken with a backhoe. All dredging spoils will be trucked off site and deposited in an upland agricultural area.

4. The purpose of both the culvert installation and the dredging is to restore the wildlife pond which was created by the mother of the co-applicants in the late 1960's. The pond does provide some habitat not otherwise present in the area, contributing to some increased diversity of wildlife in the area. (Ex. 15, Keir) However, the pond has also led to soil deposition in the wetlands on either side of the pond footprint, detrimentally impacting the wetland habitat.

5. Risk Creek is a Class II trout stream. Streams in this classification have some natural reproduction, but not enough to sufficiently maintain the fishery without stocking. DNR Fisheries Biologist Scot Ironside testified that there are naturally reproducing wild brook trout in Risk Creek.

6. Dredging the pond to the extent proposed by the applicants would result in increased water residence time, raising water temperatures to a level that is detrimental to the public interest in the trout fishery. Further, the pond area is located near the springs which are the headwaters of the creek, which means that any increase in water temperature would impact the entire stream.

DNR Water Management Specialist Rhonda Kenyon provided un rebutted expert testimony which demonstrated the impact the pond in its present form has on water temperatures. At the request of the co-applicants, an Adams County Department of Land Conservation LTE, Gavin Pfeiffer, took readings of air and water temperatures at selected locations above and below the existing ponds in the summer of 2002. (Ex. 3) Interpreting this data, both Ms. Kenyon and Mr. Ironside opined that the difference in temperatures (ranging from approximately 3.3 to 3.8 degrees F) would detrimentally impact the trout fishery. Some of the temperatures in the pond area would be fatal to trout.

7. The proposed project would result in adverse direct and cumulative impacts to the cold water fishery. There are two other nearby similar artificial ponds in the area of Risk Creek headwaters. (Ironside) If this project is approved, it is likely that the other ponds would be as well. (Kenyon) The cumulative detrimental impacts to water temperature would detrimentally impact the trout fishery.

8. The proposed culvert installation would serve to restrict water flow, also increasing water residence times and water temperatures.

9. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

10. The proposed structure will not reduce the effective flood flow capacity of Risk Creek upon compliance with the conditions in the permit.

11. The proposed structure will have an adverse impact on water quality in Risk Creek because it is likely to raise water temperatures. The structure will not cause environmental pollution as defined in Wis. Stat. § 283.01 if the structure is built and maintained in accordance with this permit.

12. The DNR has complied with the procedural requirements of Wis. Stat. § 1.11, and Wis. Admin. Code ch. 150.

DISCUSSION

The mother of the co-applicants, acting on the best information available to her in the 1960's, oversaw the construction of a wildlife pond on her property in Adams County, Wisconsin. As the photos presented by the co-applicants attest, the pond was a beautiful addition to the landscape and has been a feature of the co-applicants' use of the property for many years. They are understandably anxious to preserve what they see as their mother's legacy to this beautiful spot on Risk Creek. There is just one problem with acceding to their request to re-dredge the pond and return it to its former splendor: new information, not available to Ms. O'Brien, makes it clear that maintaining the pond in its present location would have a detrimental impact on the public interest in maintaining the trout fishery.

The pond is located very close to the springs which bring cold groundwater into Risk Creek, making the stream suitable to support a trout fishery. Dredging the pond and putting in a culvert will both increase the residence time of water, which has the effect of raising water temperatures closer to the air temperature. Increased water temperature can have a devastating impact on trout. The co-applicants argued that making the pond deeper might actually lower, rather than raise, water temperatures. However, Mr. Ironside provided expert testimony that the proposed water depths would not be enough to provide the stratification of water temperatures necessary to accomplish this possibility. Rather, as the County data demonstrates, the larger surface area of stagnant pond water will raise water temperature in the creek. Further, this pond is one of several in the area close to the headwaters of Risk Creek. Approval of this permit request would make it difficult to deny other similar requests which are bound to follow. Accordingly, the permit request must be denied.

DNR staff testified that it would likely be possible to find an alternative location for a wildlife pond on the property-- located a safe distance away from Risk Creek. This would no doubt involve greater expense to the co-applicants, but would allow for placement of a pond that does not interfere with public rights in Risk Creek. Alternatively, cost sharing may be available if the stream is restored to the natural state.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of Wis. Stat. § 30.12.
2. The proposed structure described in the Findings of Fact constitute a structure within the meaning of Wis. Stat. § 30.12.
3. The Division of Hearings and Appeals has authority under Wis. Stat. § 30.12 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of structures which impact public rights in navigable waters.
4. The project would not meet the requirements of Wis. Stat. § 30.20(2)(c), because the project would not be consistent with the public interest in Risk Creek.
5. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the permit application be denied, and the contested case dismissed.

Dated at Madison, Wisconsin on June 25, 2003.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.